KOH LAI KIOW

v.

LOW NAM HUI

HIGH COURT MALAYA, JOHOR BAHRU
AZAHAR MOHAMED JC
[ORIGINATING SUMMONS NO: 24-113-2004 (4)]
27 MAY 2005

FAMILY LAW: *Children - Illegitimate - Application for guardianship and lump sum maintenance by natural mother - Whether she was entitled to apply for maintenance under Guardianship of Infants Act 1961 - Whether correct application should be under s. 3(2) Married Women and Children (Maintenance) Act 1950 - Whether application should be filed in appropriate court of first instance - Guardianship of Infants Act 1961, s. 19A(2)(b) - Married Women and Children (Maintenance) Act 1950, ss. 2, 3(2)*

This was an application by the plaintiff against the defendant for the following orders under the Guardianship of Infants Act 1961 ('the 1961 Act'): (1) that the sole custody, care, control and guardianship of their two children be given to the plaintiff; (2) that the defendant do pay to the plaintiff the sum of AUD4,172,037 as a lump sum maintenance for the two children; (3) that the costs of this application be borne by the defendant; and (4) such other reliefs as this court may deem fit. The plaintiff and the defendant, the biological and natural parents of the two children, had been married in 1983 according to Chinese customary rights. This marriage had never been registered under the Law Reform (Marriage and Divorce) Act 1976; thus, it was void and the two children were their illegitimate children. The parties were now separated and the plaintiff was living with the two children in Melbourne, Australia. The plaintiff relied heavily on s. 19A(2)(b) of the 1961 Act to support her argument that the court should order the defendant to pay the lump sum maintenance for the two children. The defendant, on the other hand, contended that his legal obligation as the putative father to provide maintenance for his two children was provided under s. 3(2) of the Married Women and Children (Maintenance) Act 1950 ('the 1950 Act'), under which the plaintiff had made no application whatsoever for the court to determine. Therefore, the primary question of law requiring determination was whether the 1961 Act or the 1950 Act applied for the maintenance of the two illegitimate children.

Held
(allowing the application in part):

[1] The plaintiff was not entitled to apply for the maintenance of the two children under the 1961 Act since there is no express provision in it regarding maintenance for illegitimate children. Section 19A(2)(b) of the 1961 Act had no relevance to the matter in issue as it did not apply to illegitimate children. The plaintiff was entitled to apply for the maintenance of the two children under s. 3(2) of the 1950 Act since this section is a special provision dealing with the maintenance of illegitimate children. Nevertheless, this court was unable to quantify the appropriate monthly allowance under the 1950 Act from the evidence adduced in the affidavits and the circumstances of this case. In any event, the expression "court" in s. 3(2) read together with s. 2 of the 1950 Act means a sessions court or a court of a first class magistrate. It was clear that s. 3(2) of the 1950 Act gives a sessions court or a court of a first class magistrate the jurisdiction to order any person who neglects or refuses to maintain an illegitimate child to make such monthly allowance as to the court seems reasonable. As a result, it was only proper that the appropriate court of first instance should deal with this matter. Therefore, the plaintiff's prayer (1) for sole custody of the children was allowed – the defendant had no objection and consented to it – but prayer (2) for lump sum maintenance was hereby dismissed with liberty to the plaintiff to proceed afresh with the claim for maintenance under the 1950 Act. As agreed by both sides, no order as to costs was made. (pp 142 g, 148 c-f & 149 d)

[Order accordingly.]

Case(s) referred to:
Chai Siew Yin v. Leong Wee Shing (Civil Appeal No: 02-10-2003 (W)) (Unreported) ***(foll)***
Goh Koon Suan v. Heng Gek Kiau [1992] 2 CLJ 812; [1992] 2 CLJ (Rep) 416 HC
Khor Liang Keow v. Tee Ming Kook [1996] 2 CLJ 631 HC ***(foll)***
Low Pek Nai v. Koh Chye Guan [1995] 2 CLJ 110 HC ***(not foll)***
Re Balasingam & Paravathy [1970] 2 MLJ 74 ***(foll)***
Sinnakaruppi Periakaruppan v. Bathumalai Krishnan [2001] 2 CLJ 435 HC ***(refd)***
T v. O [1993] 1 MLJ 168 ***(foll)***

Legislation referred to:
Guardianship of Infants Act 1961, ss. 5, 19A(2)(b)
Married Women and Children (Maintenance) Act 1950, ss. 2, 3(2)

Other source(s) referred to:
P St J Langan, *Maxwell on The Interpretation of Statutes,* 12th edn, p 196

For the plaintiff - KS Pang (Rosita Yeo with him); M/s Rosita Yeo & Co
For the defendant - Wong Kim Fatt (PY Tng with him); M/s PY Tng, David Leow & Co

Reported by Suresh Nathan

JUDGMENT

Azahar Mohamed JC:
This application raises a point of law concerning maintenance of illegitimate children. It is an application filed by the plaintiff on 16 January 2004 against the defendant for the following orders under the Guardianship of Infants Act 1961 (the 1961 Act):

1. That the sole custody, care and control and sole guardianship of the two children, a male born on 18 October 1988, and a male born on 16 August 1990 be given to the plaintiff;

2. That the defendant do pay to the plaintiff the sum of AUD4, 172,037-00 as a lump sum maintenance for the two children;

3. That the costs of the application and/or its incidental thereto be borne by the defendant;

4. That such other relief or reliefs as this court may deem fit.

To put things in proper context, I think it would be useful to set out the factual background concerning the legal relationship between the plaintiff and the defendant. The plaintiff is now 50 years of age and the defendant who is a successful businessman is now 86 years old. It is not in dispute that the plaintiff and the defendant are the biological and natural parents of the two children. According to the plaintiff in her affidavit, since September 1995 the defendant left her and the two children and went to live in another residence. Apparently, the relationship between the plaintiff and the defendant came under strain. The plaintiff and the two children are now living in Melbourne, Australia. They left Malaysia in January 1997. The two children are both presently studying in a grammar school, Melbourne, Australia in year 11 and year 9 respectively. In her affidavit the plaintiff said that she has the financial capability to support the two children and provide all the care and attention they required. However, the plaintiff also said that because of her age she is worried that should anything happen to her, the two children would not be

sufficiently maintained without the help of the defendant. She said that the defendant as the natural and biological father of the two children is under a legal and moral duty to maintain them. It appears that the defendant used to give RM17,000 per month to maintain the plaintiff and the two children up to July 2002 but since then he ceased to make any payment. The plaintiff also said that the lump sum claim of AUD4,172,073.96 (equivalent to RM12,315,856.05 at the rate of exchange of AUD1 to RM2.952 as at 15 April 2005) for the children's living expenses, health care costs and education until they complete their tertiary education and financially independent is fair and reasonable in the circumstances of the case. On his part, the defendant in his affidavit said that at all material time he has been providing for the maintenance and care of the plaintiff as well as the two children subsequently after their birth. The defendant maintained that he has provided adequately for the plaintiff with substantial assets in Johor Bahru and Melbourne, Australia for herself and the two children. He also said that the exorbitant claim is made *mala fide* to enrich unjustly the plaintiff. According to the defendant the huge lump sum claim is grossly excessive and totally unreasonable having regard to all the circumstances for the maintenance or education of the two children.

At this stage, I want to point out that the plaintiff alleged in her affidavit that she was married to the defendant on 12 April 1983 in Johore Bahru according to Chinese customary rites. I would assume for the purpose of this application that there was a customary marriage between the plaintiff and the defendant. It is not in dispute that the customary marriage has never been registered under the Law Reform (Marriage and Divorce) Act 1976. Learned counsel for the defendant has drawn to my attention the oral decision of the Federal Court given on 29 January 2004 in *Chai Siew Yin v. Leong Wee Shing* in Federal Court Civil Appeal No. 02-10-2003(W). In view of the decision of the Federal Court, to my mind there can be no doubt that the customary marriage between the plaintiff and the defendant is void and ought not to he recognized for non-registration. That is why, in my view, the legal consequences are that the two children who were born out of a relationship between the plaintiff and the defendant are the illegitimate children of them. There is another point regarding this case that I should mention at this moment. The defendant has no objection and consented to the plaintiff's prayer 1, that is, an order be made that the sole custody, care and control and sole guardianship of the two children be given to the plaintiff.

Learned counsel for the plaintiff placed heavy reliance on s. 19A(2)(b) of the 1961 Act to support his argument that the court should order the defendant to pay lump sum maintenance to the two children. On the other hand, learned counsel for the defendant argued that the defendant's legal obligation as the

putative father to provide maintenance to his two children is provided under s. 3(2) of the Married Women and Children (Maintenance) Act 1950 (the 1950 Act), under which the plaintiff has made no application whatsoever for the court to determine. As a result, the primary question of law which arises for decision here is whether the 1961 Act or the 1950 Act applies for the maintenance of the two illegitimate children born out of cohabitation between the plaintiff and the defendant. One point I want to make at this juncture is that s. 3(2) of the 1950 Act enacts that if any person neglects or refuses to maintain an illegitimate child of his which is unable to maintain itself, a court, upon due proof thereof, may order such person to make such monthly allowance as to the court seems reasonable. I shall discuss the significance of this provision in the latter part of my judgment.

I do not wish to embark in any analysis of the relevant provisions in the 1961 Act in view of the decided cases on this subject. The relevant provisions have been discussed at length and with great care by the learned indues. It seems that the first reported local case on the question whether the 1961 Act applies to illegitimate children was *Re Balasingam & Paravathy* [1970] 2 MLJ 74. The following passages in the judgment of Raja Azlan Shah J (as His Majesty then was) at p. 75 of the report is of relevance:

> The Guardianship of Infants Act, 1961 does not seem to provide for illegitimate children. The remarkable absence of any reference to illegitimate children other than in the abovementioned section 1(2)(a) would seem to favour the proposition that Parliament intended the Act not to apply to illegitimate children. This proposition is fortified by respondent's arguments on the correct construction of the words "father" and "mother" in section 5 and 6. Furthermore, adopting the approach taken by Viscount Simonds in *Galloway v. Galloway* it is safer to say that "infant" means legitimate infant unless there is some repugnancy or inconsistency and not merely some violation of the moral obligation or of a probable intention resulting from so interpreting the word. Accordingly, since none of the words "father", "mother" or "infant" can be construed to mean illegitimate infant or the *de facto* parents of illegitimate children, it must be concluded that the Act does not apply to illegitimate children.

Learned counsel for the plaintiff in his written submission dated 19 April 2005 has referred me to two cases to support his argument that the 1961 Act applies to illegitimate children. The first is the case of *Low Pek Nai v. Koh Chye Guan @ Koh Chai Guan* [1995] 2 CLJ 110 where Hishamudin J found himself in disagreement with the views expressed by the learned judge in *Re Balasingam (supra)* and held that 1961 Act applied also to illegitimate children. In this regard, Zulkefli Ahmad Makinudin JC (as he then was) in *Khor Liang Keow v. Tee Ming Kook* [1996] 2 CLJ 631 disagreed with Hishamuddin J in

the case of *Low Pek Nai (supra)* and agreed with the learned judge in *Re Balasingam (supra)*. At p. 638 of the report Zulkefli Ahmad Makinuddin JC (as he then was) said:

> Saya berpendapat dalam kes ini timbul persoalan samada Mahkamah mempunyai bidangkuasa atau tidak di bawah Akta Penjagaan Kanak-Kanak 1961 untuk mendengar permohonan untuk perintah hak penjagaan dan pengawalan ke atas kedua-dua anak yang tak sah taraf ini. Dalam hal ini peguam plaintif telah merujuk kepada saya kes *Low Pek Nai v. Koh Chye Guan @ Koh Chai Guan* [1995] 2 CLJ 110 di mana Yang Arif Hakim Mohd. Hishamudin telah memutuskan bahawa Akta Penjagaan Kanak-Kanak 1961 terpakai kepada anak tak sah taraf dan Mahkamah mempunyai bidangkuasa untuk mendengar permohonan ibu sebenar untuk hak penjagaan dan pengawalan ke atas anak tak sah taraf tersebut. Yang Arif Hakim Mohd. Hishamudin dalam penghakimannya telah merujuk kepada peruntukan s. 3 Akta tersebut yang menyatakan bahawa peruntukan tersebut membolehkan Dewan Undangan Negeri meluluskan pemakaian Akta tersebut kepada kanak-kanak Muslim tidak kira samada anak itu sah taraf atau tidak sekiranya ianya tidak bertentangan dengan Undang-Undang Islam. Yang Arif Hakim tersebut menyatakan jika peruntukan ini membolehkan pemakaian terhadap kanak-kanak Muslim maka Akta tersebut juga adalah terpakai kepada semua kanak-kanak secara am samada ianya sah taraf atau tidak. Dengan rasa penuh hormat kepada pandangan Yang Arif Hakim Mohd. Hishamudin ini dalam isu bidangkuasa Akta tersebut bagi mendengar permohonan penjagaan anak tak sah taraf, saya lebih cenderung berpegang kepada pandangan yang telah diberi oleh Yang Arif Hakim Raja Azlan Shah (DYMM Paduka Seri pada masa itu) dalam kes *Re Balasingam (supra)* dimana telah diputuskan bahawa Akta Penjagaan Kanak-Kanak 1961 tidak terpakai kepada anak tak sah taraf.

> ["I am of the opinion that the question that arises in this case is whether or not the court has the jurisdiction under the Guardianship of Infants Act 1961 to hear an application for an order of guardianship and custody of the two illegitimate children. In this case the plaintiff's counsel has referred me to the case of *Low Pek Nai v. Koh Chye Guan @ Koh Chai Guan* [1995] 2 CLJ 110 where the Honourable Justice Mohd. Hishamudin had held that the Guardianship of Infants Act 1961 applies to illegitimate children and the court has the juristiction to hear an application by the natural mother for guardianship and custody of the illegitimate child. The Honourable Justice Mohd. Hishamudin in his judgment had referred to the provision of s. 3 of the said Act which enables the State Legislature to approve the application of the said Act to Muslim children, whether they are legitimate or not, as long as it does not violate the laws of Islam. The learned Judge has stated that if this provision applies to Muslim children, the Act will be applicable to all children generally whether legitimate or not. With due respect to the view of the Honourable Justice Mohd Hishamudin in respect of the issue of jurisdiction under the Act to hear an application for guardianship of an illegitimate child, I am more inclined to hold the view given by the Honourable Justice Raja Azlan Shah

(as His Majesty then was) in the case of *Re Balasingam (supra)* where it was held that the Guardianship of Infants Act 1961 is not applicable to illegitimate children."] (English translation provided by Editor)

And, later still he said this:

Saya berpendapat adalah jelas Parlimen tidak berhasrat Akta Penjagaan Kanak-Kanak 1961 tersebut terpakai kepada anak tak sah taraf dengan tiada rujukan secara langsung terhadapnya dalam Akta tersebut.

["I am of the view that it is clear that Parliament does not intend the Guardianship of Infants Act 1961 to be applicable to illegitimate children, without any direct reference to them in the Act."] (English translation provided by Editor)

I would respectfully agree with the reasoning stated therein by the learned judge in *Khor Liang Keow (supra)*. This brings me to the case of *Sinnakaruppi Periakaruppan v. Bathumalai Krishnan* [2001] 2 CLJ 435, which has been drawn to my attention by learned counsel for the plaintiff. In that case the plaintiff is the natural mother and the defendant is the natural father of the illegitimate child. The plaintiff is seeking only guardianship of the child. She is not asking for maintenance of the child. Jeffrey Tan J overruled the defendant's preliminary objection that the plaintiff must proceed by way of wardship proceedings, The learned judge at p. 439 of the report said:

Evidently, there is no unanimity of views. Only one case said that the GIA is applicable to illegitimate children. And only one case said that the mother seeking custody of her illegitimate children should do so by way of wardship proceedings. Still, the preponderant view is that the court has jurisdiction under s. 24 of the CJA to grant custody and guardianship of both legitimate or illegitimate infants, regardless of the GIA. It does not appear therefore, that the present plaintiff must proceed by way of wardship proceedings. Indeed, in the light of the latest amendments of the GIA (see Guardianship of Infants (Amendment) Act 1999 effective 1 October 1999), and the substitution of the former s. 5 by an altogether new s. 5 providing for equality of parental rights, there is less reason to doubt that the GIA in present form does not apply to illegitimate children. Presently, the position in England is that "the statutory provisions relating to orders for custody of, and rights of access to, a minor on the application of a mother or father apply in relation to a minor who is illegitimate as they apply in relation to a minor who is legitimate ..." (*Halsbury's Law of England*, 4th edn, para 548). Perhaps it would require further study, but *Low Pek Nai v. Koh Chye Guan* might have fortuitously and correctly stated the law. In any event, s. 24 of the CJA confers jurisdiction on the court to appoint the control guardians of infants and generally over the person and property of infants, a jurisdiction that is not only restricted to cases within the GIA. A wardship proceeding is to protect a minor. Also in wardship

proceedings, a guardian may be appointed. This proceedings, call it what you will, would achieve the same objects. It would not serve any purpose to uphold the present objection.

Now, s. 5 of the 1961 Act before the amendment reads as follows:

> Subject to s. 10, the father of an infant shall be the guardian of the infant's person and property:
>
> Provided that the Court or a Judge may make such order as it or he thinks fit regarding the custody of the infant, and the right if access thereto of either parent, and may vary or discharge such order at anytime on the application or either parent.

With effect from 1 October 1999, the above s. 5 was amended and it now reads as follows:

> (1) In relation to the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the incosme of any such property, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother an father shall he equal.
>
> (2) The mother of an infant shall have the like powers of applying to the Court in respect of any matter affecting the infant as are possessed by the father.

With respect I am unable to see that the new provisions of the 1961 Act on equality of parental rights support the contention that the 1961 Act applies to illegitimate children. I cannot find anything in the new provisions, which lead me to the view that the 1961 Act applies to illegitimate children.

I should perhaps at this point make a note that all the cases that I have discussed a moment ago concern applications for guardianship and custody of illegitimate children. It seems to me that these authorities do not directly deal with the subject of maintenance for illegitimate children. It will be noted that in the case at hand, as I have emphasized earlier, the subject matter is the maintenance for illegitimate children. This brings me again to s. 3(2) of the 1950 Act. To my mind, this section is the relevant provisions to the matter in issue before me. I think it is important to keep in mind that the section is a special provision dealing with the maintenance for illegitimate children. The point is this. This section is very clear and direct. It is specifically designed to provide maintenance for illegitimate children. I say this because in the face of the abundantly clear words, the express stipulations of s. 3(2) in the light

of its specific intention and object cannot be disregarded. I lay emphasis on the fact that the 1950 Act is an earlier statute where the legislature has specifically directed its attention and made provisions for maintenance of illegitimate children. I need hardly to say that the court must give effect to the clear and explicit language in legislations enacted by Parliament. Section 3(2) of the 1950 Act was referred to by Shankar J (as he then was) in *T v. O* [1993] 1 MLJ 168. In the course of his judgment in that case, Shankar J said this at p. 172:

> Under English common law, a father of an illegitimate child had no rights' over the child merely by virtue of his paternity. He had a legal obligation to support it, provided that it could be legally established that he was the father. That had to be done bv extrinsic evidence. Maternity is a fact. Paternity only an opinion. The very serious social consequences which would follow by equating a natural father or mother to a lawful father or mother in the English legislation under consideration has been spelt out at great length and with great clarity by Roxburgh J and need not be repeated here.
>
> Under our Married Women and Children (Maintenance) Act 1950 s. 3(2), due proof is required both that the person sued is the father, and that his illegitimate child is unable to maintain itself, before the court will order maintenance. But once again, be it noted that the sum is not to exceed RM50 per month! Legitimate children can get a reasonable monthly allowance, as can their mothers. Mothers of illegitimate children are not provided for.

I would respectfully agree with the views expressed by the learned judge. Nonetheless, I need to say something about the limit of RM50 mentioned by Shankar J. With respect, the limit of RM50 was removed by the Schedule to the Law Reform (Marriage and Divorce) Act 1976, which came into force on 1 March 1982. For this reason, s. 3(2) of the 1950 Act now reads:

> If any person neglects or refuses to maintain an illegitimate child of his which is unable to maintain itself, a court upon due proof thereof, may order such person to make such monthly allowance, as to the court seems reasonable.

I also draw support from *Maxwell on The Interpretation of Statutes* (12th edn) by P. St. J. Langan which says at p. 196:

> "Now if anything be certain it is this," said the Earl of Selborne L.C. in The Vera Cruz, "that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so." In a later case, Viscount Haldane said: "We are bound ... to apply a rule of construction which has been repeatedly laid down and is firmly established.

> It is that wherever Parliament in an earlier statute has directed its attention to an individual case and has made provision for it unambiguously, there arises a presumption that if in a subsequent statute the Legislature lays down a general principle, that general principle is not to be taken as meant to rip up what the Legislature had before provided for individually, unless an intention to do so is specially declared. A merely general rule is not enough, even though by its terms it is stated so widely that it would, taken by itself, cover special cases of the kind I have referred to.

It is for these reasons that I consider the plaintiff is not entitled to apply for the maintenance of the two children under the 1961 Act. There is no express provision in the 1961 Act regarding maintenance for illegitimate children. To my mind, the provision of s. 19A(2)(b) of the 1961 Aet which learned counsel for the plaintiff seeks to rely on has no relevance to the matter in issue as it does not apply to illegitimate children. In my judgment, the plaintiff is entitled to apply for the maintenance of the two children under s. 3(2) of the 1950 Act. Nevertheless, I am unable to quantify the appropriate monthly allowance under the Act for the following reasons. Under s. 3(2) of the Act, due proof is required before the court will order maintenance. As stated by this provision, the children can get a reasonable monthly allowance. In this regard, I note that a substantial part of the affidavits filed by the plaintiff revolves around the question of lump sum maintenance. Hence, from the evidence adduced in the affidavits and in the circumstances of this case, it is not possible to quantify a reasonable monthly allowance that the defendant should pay to the plaintiff as maintenance for the two children. In any event, the expression "court" in s. 3(2) read together with s. 2 of the 1950 Act means a Sessions Court or a Court of a First Class Magistrate. It is clear to me that s. 3(2) of the 1950 Act gives a Sessions Court or a Court of a First Class Magistrate the jurisdiction to order any person who neglects or refuses to maintain an illegitimate child to make such monthly allowance as to the court seems reasonable. As a result, in my view, it is only proper that the appropriate court of first instance should deal with this matter. In this context, the authority that I would like to cite is the case of *Goh Koon Suan v. Heng Gek Kiau* [1992] 2 CLJ 812; ([1992] 2 CLJ (Rep) 416). There, the defendant applied under s. 3(2) of the 1950 Act for the maintenance of a child born as a result of cohabitation between the plaintiff and defendant. At the hearing of that application counsel for the plaintiff took a preliminary objection that the High Court as a court of first instance had no jurisdiction to hear the application. James Foong JC (as he then was) dismissed the defendant's application and he said this, and I respectfully agree with him, at p. 813 (p. 417) of the report:

The 'Court' granting such relief under the said Act has been defined under s. 3 of the said Act, as the subordinate courts. Therefore, such relief as claimed by the defendant, should in the first instance, be brought in the subordinate court. Only when, as provided for under s. 8 of the said Act, such matters in the opinion of the subordinate court are more conveniently dealt with by the High Court, can the matter be referred to the High Court.

Learned defence counsel's reliance on s. 9 of the said Act, to provide the High Court with jurisdiction to hear this application, as a court of first instance, is a misinterpretation of this particular section of the Act.

Though s. 9 does provide the High Court with powers to determine matters arising from the said Act, its powers only relate to matters referred to it by the subordinate courts under s. 8. Section 9 must he read in connection with and, in consequence to s. 8 of the Act and not, on its own to imply that, the High Court can hear such matters in the first instance. Therefore, the court of first instance for relief sought under the Act must be the subordinate court.

The result therefore is that I would allow the plaintiff's prayer 1. However, prayer 2 for lump sum maintenance is hereby dismissed with liberty to the plaintiff to proceed afresh with the claim for maintenance under the 1950 Act. As agreed by both sides, I make no order as to costs.